

1 THE HONORABLE JOHN C. COUGHENOUR

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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 KEVIN CAMPBELL,

10 Petitioner,

11 v.

12 UNITED STATES OF AMERICA,

13 Respondent.

CASE NO. C18-0274-JCC

ORDER

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15 This matter comes before the Court on Petitioner Kevin Campbell's motion to vacate, set
16 aside, or correct his sentence, under 28 U.S.C. § 2255, and motion to appoint counsel (Dkt. No.
17 14). Petitioner pled guilty to distribution of controlled substances. *See United States v. Campbell*,
18 Case No. CR17-0025-JCC, Dkt. Nos. 9, 12 (W.D. Wash. 2017). On August 8, 2017, Petitioner
19 was sentenced to 72 months of imprisonment, followed by 3 years of supervised release. *Id.* at
20 Dkt. No. 36.

21 Before directing service and answer to a habeas corpus petition, the Court must determine
22 whether the motion, the files, and the records of the case "conclusively show that the prisoner is
23 entitled to no relief." 28 U.S.C. § 2255(b). In his plea agreement, Petitioner waived "[a]ny right
24 to bring a collateral attack against the conviction and sentence, including any restitution order
25 imposed, except as it may relate to the effectiveness of legal representation." *United States v.*
26 *Campbell*, Case No. CR17-0025-JCC, Dkt. No. 9 at 12 (W.D. Wash. 2017). Petitioner raises four

ORDER
C18-0274-JCC
PAGE - 1

1 potential grounds for relief—(1) involuntariness of his plea agreement; (2) ineffective assistance
2 of counsel; (3) unconstitutional sentence imposed; and (4) “post-incarceration rehabilitation.”
3 (*See* Dkt. No. 14.)

4 The Ninth Circuit has upheld the enforceability of a knowing and voluntary waiver of the
5 right to bring a collateral attack for pre-plea constitutional violations. *United States v. Abarca*,
6 985 F.2d 1012, 1014 (9th Cir. 1993). However, such a waiver does not preclude a § 2255 claim
7 for involuntariness of waiver. *Id.* The record does not conclusively show that Petitioner is
8 entitled to no relief on this ground. Therefore, service on Petitioner’s involuntariness of waiver
9 claim is proper.

10 Petitioner’s plea agreement waives any right to bring a collateral attack, “except as it may
11 relate to the effectiveness of legal representation.” *See United States v. Campbell*, Case No.
12 CR17-0025-JCC, Dkt. No. 9 at 12 (W.D. Wash. 2017). With that ground for relief, the record
13 does not conclusively show that Petitioner is entitled to no relief. Therefore, service on
14 Petitioner’s ineffective assistance of counsel claim is proper.

15 Although a petitioner is generally precluded from challenging sentencing errors on a
16 § 2255 petition, “[e]xception has frequently been made for constitutional questions.” *See United*
17 *States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994). Because Petitioner’s third ground raises
18 the constitutionality of a component of his sentence, service on ground three is proper.

19 Petitioner’s fourth ground is titled “post-incarceration rehabilitation.” (*See* Dkt. No. 14.)
20 On this ground, Petitioner appears to argue that the Court should consider his good behavior
21 during incarceration when it resentences Petitioner. (*Id.* at 30–31.) The Court does not view this
22 as a ground for relief under § 2255, but a reason to reduce Petitioner’s sentence, should the Court
23 grant Petitioner’s underlying § 2255 motion. Therefore, this argument is untimely. If the Court
24 grants Petitioner’s § 2255 motion, Petitioner should raise this argument at a later proceeding.
25 Therefore, service on ground four is improper and this ground is DISMISSED.

26 Finally, Petitioner requests the appointment of counsel and an evidentiary hearing. (*See*

1 Dkt. No. 14-1 at 31.) There is no general right to have counsel appointed in cases brought under
2 28 U.S.C. § 2255 unless an evidentiary hearing is required. *See Terrovona v. Kincheloe*, 852
3 F.2d 424, 429 (9th Cir. 1988). The Court may exercise its discretion to appoint counsel for a
4 financially eligible individual where the “interests of justice so require.” 18 U.S.C. § 3006A. At
5 this time, the Court does not find that an evidentiary hearing will be necessary and therefore,
6 Petitioner’s request to appoint counsel is DENIED.

7 Accordingly, the Court ORDERS as follows:

- 8 1. The Clerk shall direct a copy of this order to Petitioner.
- 9 2. If not previously accomplished, electronic posting of this order and petition shall
10 effect service upon the United States Attorney of copies of the § 2255 motion and of
11 all documents in support thereof.
- 12 3. Within 45 days after such service, the United States shall file and serve an answer in
13 accordance with Rule 5 of the Rules Governing Section 2255 Cases in United States
14 District Courts. As part of such answer, the United States should state its position as
15 to whether an evidentiary hearing is necessary, whether there is any issue as to abuse
16 or delay under Rule 9, and whether Petitioner’s motion is barred by the statute of
17 limitations.
- 18 4. On the face of the answer, the United States shall note the answer for consideration
19 on the fourth Friday after it is filed, and the Clerk shall note the answer accordingly.
20 Petitioner may file and serve a reply to the answer no later than that noting date.
- 21 5. The Clerk is DIRECTED to terminate Docket Number 7 as moot.

22 DATED this 8th day of April 2019.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE